Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Air Canada Pilots Association,

complainant,

and

Air Canada,

respondent.

Board File: 29271-C
Neutral Citation: 2012 CIRB **644**
June 15, 2012

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. John Bowman and David Olsen, Members. A case management teleconference was held on April 25, 2012, at which the Board requested the parties' submissions on the possible impact of section 24 of the *Protecting Air Service Act*, S.C. 2012, c.2 (*PASA*) and section 87.5 of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) on the portion of the complaint alleging violation of section 50(b) of the *Code*. The parties made written submissions on these two issues and pleadings closed on May 28, 2012.

Although the parties suggested that an oral hearing might be required, having carefully reviewed their respective written submissions, the Board is satisfied that an oral hearing is not required and exercises its discretion under section 16.1 of the *Code* to decide the matter on the basis of the written record.

Counsel of Record

Mr. Steve H. Waller and Mr. Chris Rootham, for the Air Canada Pilots Association; and
Mr. John D.R. Craig and Ms. Michelle D. MacGillivray, for Air Canada.

I–Nature of the Application

[1] On February 13, 2012, the Air Canada Pilots Association (ACPA or the Association) filed a complaint with the Board alleging that Air Canada (the employer) had violated sections 50(b), 94(1)(a), 94(3)(a)(i) and 94(3)(b) of the *Code* by unilaterally withdrawing certain travel privileges accorded to Association representatives on February 6, 2012. At the time, the parties were engaged in collective bargaining for the renewal of a collective agreement that had expired on March 31, 2011, but which continued in full force and effect. The parties agree that, on the date that the employer announced the change to the travel priority for Association representatives, the conditions set out in section 89(1)(a) to (d) of the *Code* had not yet been met.

[2] The complaint alleges that, by making this change at the time it did, Air Canada violated the statutory freeze contrary to section 50(b) of the *Code*; interfered with ACPA's representation of its members, contrary to section 94(1)(a) of the *Code*; discriminated against ACPA members who are Association representatives, in violation of section 94(3)(a)(i) of the *Code*; and imposed a condition of employment that restrains employees from exercising their rights under the *Code* to represent their members, contrary to section 94(3)(b) of the *Code*.

[3] The Board notes that, pursuant to section 98(4) of the *Code*, the employer bears the onus of proof with respect to those portions of the complaint alleging violation of section 94(3) of the *Code*.

II–Background and Facts

[4] ACPA has been the certified bargaining agent for a unit of pilots employed by Air Canada at various bases across Canada since November 14, 1995. ACPA and Air Canada have been party to successive collective agreements, the most recent of which expired on March 31, 2011.

[5] Bargaining for the renewal of this agreement began in October 2010, although formal notice to bargain was only served on March 29, 2011. A tentative agreement reached by the bargaining committees was rejected by the Association membership in May 2011. On October 26, 2011, Air Canada filed a notice of dispute with the Minister of Labour under section 71 of the *Code*, thereby invoking the dispute resolution procedures set out in the *Code*. The statutory conciliation process ended on January 23, 2012; by operation of law, the parties therefore acquired the legal right to strike or lockout as of February 14, 2012, the date on which the conditions set out in section 89(1)(a) through (d) of the *Code* were met.

[6] Two events that occurred subsequent to the union's complaint may have implications for the respective rights and obligations of the parties following the acquisition of the right to strike or lockout on February 14, 2012. These are the Minister of Labour's reference to the Board under section 87.4 (maintenance of activities) of the *Code* on March 8, 2012, and the coming into force of the *PASA* on March 16, 2012. The effect of these events will be dealt with later in these reasons.

[7] While collective bargaining was in progress, Air Canada notified ACPA in September 2011 that it was reviewing the issue of travel priority for union officials generally, and specifically ACPA's request to use business travel to conduct internal Association business. On February 6, 2012, Air Canada verbally notified ACPA that it had revised the manner of allocating flight passes to ACPA representatives traveling on Air Canada flights for ACPA business. It is the implementation of this change that forms the basis of the instant complaint.

[8] Article 34.05 of the collective agreement between ACPA and Air Canada deals with the issue of travel while on ACPA business:

> 34.05 Travel While on Association Business
>
> Air Canada ACPA members traveling on Association business shall be issued passes and flight deck authority when conducting Air Canada business.

[9] Prior to the events that form the basis of this complaint, Air Canada permitted ACPA representatives traveling on Association business to book "positive space" travel in economy seating,

with the ability to upgrade to a business class seat, if one was available. The booked seat would then be removed from inventory and could not be sold. The consequence of the revision to this policy is that ACPA representative traveling on Association business are now required to travel on a "contingent space-available" basis, which involves making a booking that is subject to seat assignment just prior to departure only if seats are available at that time.

III–Positions of the Parties

A–ACPA

[10] ACPA submits that all Air Canada employees enjoy free travel with Air Canada, although the conditions attached to this privilege vary depending on the purpose of the travel. For example, an employee traveling on a "positive space" basis can only be displaced in very limited circumstances. However, employees traveling with "contingent space-available" status can only provisionally book a seat, and can be displaced by any paying passenger, an employee traveling on a positive space basis, or an employee traveling on a contingent space-available basis with a higher boarding priority. Within these two categories of travel, there are further distinctions, such as a higher boarding priority or the ability to upgrade to a business class seat if one is available. Accordingly, the risk of failing to secure a seat on a particular flight is much higher when the employee is traveling on a "contingent space-available" basis with a low boarding priority.

[11] The union states that, for approximately 10 years, ACPA representatives traveling on Association business enjoyed one of the highest privileges given to non-management employees, namely positive space travel in economy seating, the ability to upgrade to a business class seat if one was available, and a high boarding priority. It alleges that the downgraded travel priority now accorded to ACPA representatives is far lower, giving the pass holder only standby rights for economy seats at a much lower boarding priority. This downgraded travel priority applies to travel for all union business that does not involve a meeting with the employer, such as meetings of ACPA's elected and appointed representatives as well as meetings with rank and file Association members, which are important to the administration of the union.

[12] The union argues that, as a result of this unilateral change to ACPA representatives' pass privileges, they have spent wasted hours on standby at a time when they most needed to deal with their members. In order to secure guaranteed seating, ACPA representatives have had to pay personally for travel previously provided by Air Canada without charge. ACPA views the sudden and drastic downgrading of travel privileges for ACPA representatives as punitive, and contrary to a number of provisions of the *Code*, as set out above.

[13] The union points out that, by virtue of section 87.5 of the *Code*, a second statutory freeze comes into effect when the Board is seized with an application or referral under section 87.4 of the *Code*. Such a referral was made to the Board by the Minister of Labour on March 8, 2012 and, as the Board has not yet disposed of the referral, that freeze remains in effect. ACPA argues that, by virtue of section 50(b) of the *Code*, it was unlawful for the employer to change the employees' pass privileges on February 6, 2012, that any such changes were therefore void *ab initio*, and that the coming into force of the section 87.5 freeze on March 8, 2012 restored all of the rights and privileges of the employees and the bargaining agent that were in place prior to February 14, 2012. ACPA requests that Air Canada be required to undo the effects of the change that it implemented and compensate ACPA for any losses during the periods when either of the two statutory freezes were in effect.

[14] At the Board's invitation, ACPA also made submissions on the effect of the *PASA* on this complaint. Section 24 of that *Act*, which came into force on March 16, 2012, had the effect of reviving the expired collective agreement between ACPA and Air Canada. ACPA argues that this provision has no impact on the statutory freeze contained in section 50(b) of the *Code*, which exists independent of the collective agreement for the period between the date notice to bargain is served and the date on which the requirements of section 89(1)(a) to (d) are met. ACPA states that, in its view, the revival of the expired collective agreement does not end the statutory freeze prescribed in section 50(b). ACPA also points out that the statutory freeze protects a broader series of terms and conditions than those set out in the collective agreement, since it extends to "any right or privilege" of the employees in the bargaining unit and/or the bargaining agent. Accordingly, ACPA states that section 24 of the *PASA* has no relevance to its complaint under section 50(b) of the *Code*.

B–Air Canada

[15] Air Canada states that the revisions it made to its flight pass policy in February 2012 were for the purpose of harmonizing the availability of flight passes for all of the unions at Air Canada in order to achieve fairness. It states that the employer permits confirmed (positive space) travel when a union or Association representative is meeting with Air Canada officials or traveling on what it considers to be Air Canada business. However, travel passes for union or Association business are now provided on a contingent space-available basis.

[16] The employer admits that ACPA representatives had been traveling on a more generous priority than other union representatives prior to February 6, 2012. Representatives of the other unions at Air Canada have only ever been able to book in the contingent space-available category. The revisions made by the employer on February 6, 2012 harmonized the travel rights extended to the representatives of the various bargaining agents at Air Canada, and specifically addressed the "anomalous" priority that ACPA representatives enjoyed over representatives of other unions.

[17] Air Canada submits that section 87.5 of the *Code* is irrelevant to the complaint, as the Ministerial referral to the Board under section 87.4 was made on March 8, 2012, more than a month after Air Canada implemented the change to its travel pass policy. It argues that the union's submission that the statutory freeze contained in section 87.5 had the effect of restoring any rights and privileges that existed before February 14, 2012 is untenable, given the strong presumption against the retroactive application of legislation. Air Canada submits that, in the absence of any language in section 87.5 of the *Code* to suggest that Parliament intended this provision to have a retroactive effect, it cannot be interpreted as the union suggests. Furthermore, Air Canada argues, giving section 87.5 of the *Code* retroactive effect would render unlawful changes to terms and conditions of employment that were lawfully made by the employer prior to the date of the Ministerial reference, precisely the sort of retroactive illegality that the Federal Court of Appeal cautioned against in *Reference Re Postal Services Continuation Act, 1987,* (1989) 59 D.L.R. (4th) 234.

[18] Air Canada argues that section 24 of the *PASA*, which came into force on March 16, 2012, overrides section 50(b) of the *Code* (citing *Canadian National Railway Company*, 2009 CIRB 455 (RD 455)). In this case, Air Canada submits that, because this special legislation revived the expired collective agreement and provides that it continues until replaced through the process specified in the *PASA*, that legislation effectively replaced the collective bargaining process contemplated in the *Code*, including, among other things, the original notice to bargain and the related provisions contained in section 50(b) of the *Code*. It submits that, as a result of section 24 and the related provisions of the *PASA*, section 50(b) of the *Code* was rendered wholly inapplicable to the parties as of March 16, 2012. In other words, the traditional *Code* provisions that relate to the bargaining process are no longer germane to the process to which Air Canada and ACPA have been subject since that date.

[19] Air Canada also notes that ACPA has filed a grievance alleging a violation of Article 34.05 of the collective agreement and suggests that the proper recourse for ACPA is grievance arbitration under the restored collective agreement. Air Canada submits that, in view of all of these factors, ACPA's complaint under the *Code* is frivolous and should be dismissed outright.

IV–Analysis and Decision

A–Alleged Violation of Section 50(b)–Statutory Freeze

[20] ACPA alleges that the employer's actions in unilaterally revising the pass privileges for Association representatives traveling on ACPA business violates section 50(b) of the *Code*, because it was implemented without the union's consent at a time when the statutory freeze established by that provision was still in effect. Section 50(b) provides:

> 50. Where notice to bargain collectively has been given under this Part,
> ...
>
> (b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

[21] A collective agreement deals with terms and conditions of employment and related matters (see the definition of "collective agreement" in section 3 of the *Code*), but the scope of the protection found in section 50(b) of the *Code* is deliberately more expansive. The *Code* protects matters beyond those that may be contained in the collective agreement, namely "any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent" (see, for example, *Air Canada* (1977), 24 di 203 (CLRB no. 113); *Conspec Limited* (1988), 76 di 85 (CLRB no. 721); and *Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited* (1992), 87 di 113; 17 CLRBR (2d) 238; and 92 CLLC 16,033 (CLRB no. 922)). It is therefore possible that an action that does not violate the collective agreement could still constitute a violation of section 50(b) of the *Code*.

[22] Article 34.05 of the collective agreement sets out the parties' agreement with respect to travel while on Association business, and the Board understands that the question of whether the employer's action constitutes a breach of the collective agreement is before an arbitrator for determination. However, both parties agree there has been a longstanding employer practice of fulfilling its contractual obligation to ACPA by providing Association representatives with positive space privileges. It is noteworthy that both the employer and the Association refer to the former positive space travel pass arrangement as a "privilege". The issue for the Board is whether the withdrawal of this privilege on February 6, 2012 constituted a violation of the *Code*.

[23] The Board has held that the freeze provision contained in section 50(b) does not prevent an employer from conducting "business as before" (see *Bank of Nova Scotia, Sherbrooke and Rock Forest* (1982), 42 di 398; [1982] 2 Can LRBR 21; and 82 CLLC 16,158 (CLRB no. 367)). Although Air Canada submits that the prior treatment of ACPA representatives was anomalous and that the revision it made to the manner in which it allocates flight passes to ACPA representatives was implemented for the purpose of harmonizing its policy and achieving consistency in the use of such passes by all of the unions with which it deals when their representatives are traveling on union business, it did not argue that this revision constituted "business as before".

[24] In the Board's view, the positive space travel pass privilege enjoyed by ACPA representatives until February 6, 2012 is one that is protected by the statutory freeze contained in section 50(b).

Accordingly, the employer's action in withdrawing this privilege on that date clearly constitutes a violation of section 50(b) of the *Code*.

[25] However, once the requirements of section 89(1)(a) to (d) have been completed, an employer may alter its employees' terms and conditions of employment, including any right or privilege the employees or the bargaining agent may have had. In this case, it is common ground between the parties that the processes contemplated in those provisions of the *Code* were completed on February 14, 2012. Therefore, as of that date, the employer was entitled to make any changes it wished, not only to the collective agreement, but also to "any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent". As a result, the period during which Air Canada was in violation of section 50(b) vis-à-vis this bargaining unit is limited to the period between February 6 and February 14, 2012.

[26] The subsequent reference to the Board by the Minister of Labour under section 87.4 of the *Code* and the passage of the *PASA* does not change this analysis. By the time the Minister made the reference on March 8, 2012, the revision Air Canada had made had been legally in effect since February 14. By the clear wording of section 87.5 of the *Code*, the terms or conditions of employment and rights or privileges of the employees and the bargaining agent that are subject to the statutory freeze set out in that section are those that were in effect on the date on which the Board received the Ministerial reference. The Board can find no principle of statutory interpretation that would allow it to conclude, as the union argues, that the Ministerial reference on March 8, 2012, restored the rights and privileges of the employees and the bargaining agent that were in place prior to February 14, 2012.

[27] The subsequent passage of the *PASA* does not relieve Air Canada from liability for its unlawful revocation of the positive space travel pass privilege between February 6 and February 14, 2012. Air Canada argued that, because this special legislation revived the expired collective agreement and set out a process for its replacement, the *PASA* has the effect of overriding section 50 and all of the related *Code* provisions pertaining to the renegotiation of that collective agreement. In support of this argument, Air Canada relied on RD 455.

[28] In that case, Parliament had passed back-to-work legislation imposing a dispute resolution process on the Canadian National Railway Company (CN) and the United Transportation Union (UTU) for the conductors, trainmen and yardmen (CTY) bargaining unit. Subsequent to the coming into force of the collective agreement arbitrated under the terms of that legislation, the Teamsters Canada Rail Conference (TCRC) displaced the UTU as the bargaining agent for the CTY bargaining unit. The issue for the Board was whether the TCRC was entitled to serve a notice to bargain on CN to reopen the collective agreement, as would ordinarily be its right under section 36(2) of the *Code*, or whether the special legislation operated so as to remove that right. In the circumstances of that case, the Board found that the TCRC was equally subject to the provisions of the special legislation. Because of the manner in which Parliament had defined the term "union" in the back-to-work legislation, not only did that legislation apply to the UTU, but also to any other trade union certified by the Board to represent the CTY bargaining unit. As a result, the Board concluded that it was the clear intent of Parliament that the TCRC, like its predecessor, be bound by the arbitrated collective agreement until its expiry date. Consequently, the TCRC did not have the right it would otherwise have had to reopen the collective agreement.

[29] In this case, the interpretation suggested by the employer would require that the back-to-work legislation be given retrospective effect, thereby legalizing actions that were unlawful at the time they were taken (e.g., revoking the pass privileges before the right to strike or lockout was acquired), and making unlawful actions that were legal at the time they occurred (such as the giving of the notice to bargain). The Board cannot accept an interpretation that leads to this result. While the *PASA* restored the expired collective agreement and set out a process for its amendment, that legislation operates prospectively and, without clear words to support such an interpretation, cannot have the effect of overriding the provisions of the *Code* related to collective bargaining in a manner that changes the legal effect of actions that were taken prior to the passage of the *PASA*.

[30] Accordingly, the Board finds that the *PASA* does not relieve Air Canada from liability for its unlawful revocation of the ACPA representatives' positive space travel pass privilege between February 6 and February 14, 2012.

B–Alleged Violation of Section 94(1)(a)–Interference with ACPA's Representation of its Members

[31] Section 94(1)(a) of the *Code* provides:

> 94. (1) No employer or person acting on behalf of an employer shall
>
> (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or
>
> ...

[32] ACPA alleges that the revocation of the positive space travel pass privilege interfered with its ability to represent its members. It suggests that, at the time that the privilege was withdrawn, Association representatives needed to travel extensively in order to inform their members across Canada about the state of bargaining, the possibility of imminent strike or lockout, and about the planned strike vote.

[33] Although a bargaining agent's representation of employees is generally manifested through its interactions with the employer on behalf of the members of its bargaining unit, the Board has held that the term "representation" should not be interpreted restrictively and can extend to other forms of representational activities (see *Canada Post Corporation* (1987), 71 di 215; and 87 CLLC 16,060 (CLRB (no. 654)). The purpose of this provision is to protect the union against employer pressure that seeks to undermine the union's authority in the eyes of its members. To establish a violation of this section of the *Code*, the complainant bears the onus of proving that the employer's action interfered in the union's internal affairs. It is not necessary to demonstrate anti-union animus, but it is necessary for the complainant to prove that the employer's actions interfered with its ability to represent the employees in the bargaining unit.

[34] Other than the allegation that the employer implemented the change during a period when the Association considered it critical that its representatives be in personal contact with its members, and the suggestion that Association representatives wasted time in standby status and had to pay for some flights, ACPA has not provided any details as to how the change in the nature of the travel pass privilege detrimentally affected its representational activities. ACPA representatives still benefitted

from complimentary travel on the airline, albeit with a lower priority and thus less convenience. According to Air Canada, ACPA members continued to be able to use their personal space available travel passes for Association business if they wished. The employer notes that flight pass travel of any type is never guaranteed, since it is complimentary and always subject to business and operational needs.

[35] As the union has provided no concrete evidence as to when, whether and how the revision to the flight pass policy actually interfered with ACPA's representational activities, this aspect of the complaint is dismissed.

C–Alleged vVolation of Section 94(3)(a)(i)–Discrimination Against ACPA Members who are Association Representatives

[36] Section 94(3)(a)(i) of the *Code* provides:

> 94. (3) No employer or person acting on behalf of an employer shall
>
> (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
>
> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
>
> ...

[37] Complaints under section 94(3) of the *Code* are subject to the reverse onus provision contained in section 98(4). In considering such complaints, the Board analyzes whether anti-union animus played any role in the employer's decision. An otherwise legitimate decision can constitute a contravention of the *Code* if it was in any way motivated by anti-union animus.

[38] ACPA alleges that Air Canada's decision discriminated against its representatives with respect to a term or condition of their employment because they are union representatives participating in the administration of the union.

[39] Air Canada denies that it discriminated against ACPA representatives traveling on Association business. On the contrary, it argues, the purpose of the decision to amend its travel policy vis-à-vis ACPA representatives traveling on Association business was to achieve consistency in the use of flight pass travel for union or Association business. Previously, ACPA representatives had been traveling on a more generous priority than representatives of other unions with which Air Canada deals. It argues that the February 6, 2012 revision simply harmonized the travel rights extended to the representatives of the various unions at Air Canada.

[40] In the circumstances of this case, and taking into account that ACPA representatives still have access to complimentary travel passes when traveling on Association business, and that the conditions under which they may use these travel passes are now equivalent to the conditions that apply to the representatives of other unions representing Air Canada employees, the Board is unable to find the requisite anti-union animus that would allow it to conclude that there has been a violation of the *Code*. This portion of the complaint is dismissed.

D–Section 94(3)(b)–Imposition of a Condition of Employment that Restrains Employees from Exercising their Right to Represent their Members

[41] Section 94(3)(b) of the *Code* provides:

> 94. (3) No employer or person acting on behalf of an employer shall
>
> ...
>
> (b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on them by this Part;
>
> ...

[42] ACPA alleges that Air Canada has imposed a condition of employment that restrains employees from exercising their right under the *Code* to represent their members. As noted above, complaints under this section of the *Code* are subject to the reverse onus provision contained in section 98(4).

[43] The Board finds it difficult to conclude that the reduction in an employee's travel pass priority, which is a privilege and not a right, can constitute the "imposition" of a condition that restrains or

has restrained ACPA representatives from exercising their rights under the *Code*. Air Canada did not revoke these representatives' pass privileges; they are still provided with complimentary flight passes that enable them to travel on Association business. While the reduction in their priority status may make the use of this privilege less convenient than in the past, it is not the result of a condition in the employees' contract of employment. Accordingly, this aspect of the complaint is dismissed.

V–Remedy

[44] The Board has found that Air Canada violated section 50(b) of the *Code* between February 6 and 14, 2012 when it reduced the ACPA representatives' travel pass priority while the statutory freeze was in effect. Although ACPA indicated during the case management teleconference that certain individuals had been prejudiced by this violation, it has not provided the Board with the specifics of the harm suffered by the Association and its representatives as a result of the employer's action.

[45] The parties are directed to endeavour to resolve the quantum of damages owing to ACPA for the employer's breach of the *Code*. Failing resolution within six months of the date of this decision, either party can apply to the Board for the determination of the appropriate quantum.

This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

John Bowman
Member

David Olsen
Member